United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

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FOR THE SECOND CIRCUIT

GIOVANNI GENTILE,

Plaintiff-Appellant,

—against—

KONINKLIJKE NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ N.V.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE'S BRIEF

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TABLE OF CONTENTS

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Issue

Did plaintiff prove *prima facie* unseaworthiness?

Statement

Plaintiff longshoreman appeals judgment on a verdict for defendant shipowner directed by Levet, J. at the close of plaintiff's evidence on unseaworthiness.*

Plaintiff was one of 8 holdmen (20a) who stowed general cargo of different size wooden cases, cardboard cartons, pieces of metal (24a) from 8-12 and 1-2:30 or 3 (17a, 18a,

* Plaintiff's accident occurred before 1972 amendment of the Longshoremen's & Harbor Workers' Compensation Act eliminated unseaworthy claims. Plaintiff does not appeal dismissal of his negligence claim.

21a) when they spent 5 minutes laying separation paper (21a), used to differentiate cargo destined for different ports (21a), on top of the most recently stowed cargo in the hatch square (20a, 22a) and then began stowing more cargo on top of the paper (21a), whereupon plaintiff's foot went through the paper and into a 9″-10″ wide, 3′ deep space in the previously stowed cargo (22a, 33a).

Plaintiff testified that "You always have some spaces" (27a), "You can't close up all the spaces" (31a) between different size general cargo (25a) and that the practice is to put separation paper over those spaces if the cargo is bound for different ports (26a-27a, 32a).*

Although plaintiff's complaint blamed his accident on "grease" (3a, 4a), at trial he claimed the longshoremen created an unseaworthy trap when they put separation paper over the space into which he stepped (62a). There is no claim that the space itself constituted an unseaworthy condition since, as plaintiff's counsel admitted, different size commodities "are not going to mesh like a brick wall" (61a).

Argument

Plaintiff beats a dead horse when arguing that longshoremen can create an unseaworthy stow.** Indeed, because longshoremen do the stowing, they are the ones most likely to cause any improper stowage.

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* Plaintiff's hatch boss told the longshoremen to stow the cargo "floor by floor" and they did not "leave spaces between the cargo" (45a), presumably meaning *intentionally* leave spaces.

** Plaintiff cites 2 factually inapposite cases for undisputed law: *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297 (2 Cir. 1958), cert. denied 358 U.S. 908 (1958), involving a "defective cargo-crate", 258 F. 2d, p. 299, and *Rich* v. *Ellerman & Bucknall S.S. Co.*, 278 F. 2d 704 (2 Cir. 1960), involving cargo which tilted because "not properly supported", 278 F. 2d, p. 706.

The question is whether the stow was unseaworthy. The leading case is *Nuzzo* v. *Rederi, A/S Wallenco,* 304 F. 2d 506 (2 Cir. 1962), where a longshoreman stepped in an 18″ wide, 2′ deep space between bundles of various size boards, with common sense testimony that there are always such spaces in that sort of cargo stow. Defining seaworthy stowage as "a disposition of cargo within the vessel which will be reasonably safe and convenient both for carriage at sea and for unloading at the destination", 304 F. 2d, p. 509, the Court dismissed "For lack of a finding that such a hole in a lumber stow was at odds with the 'usual and customary standards of the calling' ", 304 F. 2d, p. 510. Here, too, there was no evidence that the general cargo stow was "*obviously* at variance with general maritime practice", *ib.,* plaintiff's common sense testimony and his counsel's admission being quite the contrary.

Plaintiff cites 2 dunnage cases, *Venable* v. *A/S Det Forenede,* 399 F. 2d 347 (4 Cir. 1968), rev'g 275 F. Supp. 591 (E.D. Va. 1967), where "Plaintiff contended that the shipowner should have provided dunnage to cover up these spaces for the purpose of preventing falls between the hogsheads", 275 F. Supp. p. 593, and *Strachan Shipping Co.* v. *Alexander,* 311 F. 2d 385 (5 Cir. 1962), aff'g 195 F. Supp. 831 (E.D. La. 1961), that "Bales of cotton, of course, cannot be packed airtight. Small holes can be expected to exist in the stow. But * * * when holes large enough to receive a man appear in the stow, those holes should be covered by dunnage", 195 F. Supp., p. 833. Although plaintiff's counsel suggested after he rested that the space into which plaintiff stepped should have been dunnaged (63a), there was no evidence of any such possibility (64a), let alone necessity. "Here the evidence failed to show that either by custom, practice or the law's quest

for reasonable fitness, dunnage was ever laid over the top tier in the square * * * to afford a completely covered floor. The presence of slight spaces * * * did not establish unseaworthiness" [citing *Nuzzo*], *Boutte* v. *M/V Malay Maru,* 370 F. 2d 906, 908 (5 Cir. 1967).

Hooper v. *Terminal Steamship Co.,* 296 F. 2d 281, 282 (2 Cir. 1961), cert. denied 369 U.S. 843 (1962), held that: "As the shifting of the cargo is a condition inherent in the operation of unloading a deck cargo of lumber, the trial judge properly ruled that there could be no recovery in the absence of proof of improper stowage." Here, small spaces in a stow of general cargo separated by paper according to destination was a condition inherent in the loading operation and was not *prima facie* unseaworthy.

Conclusion

The judgment appealed should be affirmed.

Respectfully submitted,

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